

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** August 5, 2016

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2015-1855-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 122, Federal Operating Permits Program
Update to Applicable Requirements for Operating Permits
Rule Project No. 2016-012-122-AI

Background and reasons for the rulemaking:

In recent years there have been significant changes to several major federal regulatory initiatives as a result of court actions and rulemaking. Revisions to 30 Texas Administrative Code (TAC) Chapter 122 are necessary in order to reflect correct and up-to-date requirements associated with these federal regulations as they relate to the Federal Operating Permits (FOP) Program. The federal initiatives or regulations addressed as part of this rulemaking include the Clean Air Interstate Rule (CAIR), the Cross-State Air Pollution Rule (CSAPR), and the permitting of greenhouse gases (GHGs).

More specifically, the changes to Chapter 122 proposed in this rulemaking are intended to address the replacement of CAIR with CSAPR. CAIR was a regulation developed by the United States Environmental Protection Agency (EPA) to address interstate transport of power plant emissions. In December 2008, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) found that CAIR did not meet the requirements of the Federal Clean Air Act (FCAA). The DC Circuit struck down CAIR, and directed EPA to replace CAIR with a new rule consistent with the FCAA. In response, the EPA developed CSAPR, which effectively replaced CAIR. Because CSAPR is an applicable requirement under the FOP Program, it is necessary to revise Chapter 122 to add CSAPR to the definition of “applicable requirement.”

With respect to the permitting of GHGs, in March, 2014, the TCEQ adopted revised rules in 30 TAC Chapters 116 and 122 to provide for the permitting of GHGs, as directed by House Bill 788 (83rd Texas Legislature, 2013). However, in June, 2014, the Supreme Court struck down portions of the EPA’s regulations relating to permitting of GHGs. As a result, most of the 2014 revisions to Chapter 122 which established operating permit requirements for major sources of GHGs are no longer applicable. These GHG-based requirements need to be deleted from Chapter 122 to avoid unnecessary confusion and ensure that TCEQ permitting rules are consistent with current federal policies and guidance.

Re: Docket No. 2015-1855-RUL

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

This rulemaking would eliminate references to CAIR throughout Chapter 122 to clarify that CAIR is no longer an applicable requirement under the FOP Program. This rulemaking would also amend the Chapter 122 definition of applicable requirement to clarify that CSAPR is an applicable requirement. In addition, this rulemaking would remove requirements and references to GHG emissions and GHG permitting in Chapter 122, in line with the Supreme Court ruling which determined that emissions of GHGs by themselves do not trigger federal operating permit requirements. Other minor changes are proposed to update rule cross-references and correct minor grammatical errors.

B.) Scope required by federal regulations or state statutes:

The proposed changes are necessary for Chapter 122 to maintain consistency with federal regulations and reflect current applicable requirements.

In addition, Texas Health and Safety Code (THSC), §382.05102(e) requires that the commission repeal rules for the permitting of GHG emissions, if such permitting is no longer required under federal law. The proposed revisions removing language relating to the permitting of GHGs are consistent with that statutory requirement.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

The amendments are proposed under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; TWC, §5.105, General Policy; THSC, Texas Clean Air Act, §382.017, Rules; THSC, §382.011, General Powers and Duties; THSC, §382.051, Permitting Authority of Commission; Rules; THSC, §382.0515, Application for Permit; THSC, §382.054, Federal Operating Permit; THSC, §382.0541, Administration and Enforcement of Federal Operating Permit; THSC, §382.0543, Review and Renewal of Federal Operating Permit; and THSC, §382.05102, which relates to the permitting authority of the commission for GHG emissions. The amendments are also proposed under FCAA, 42 United States Code, §§7661 - 7661e.

Effect on the:

A.) Regulated community:

This rulemaking would have a minimal effect on the regulated community. It will ensure that federal operating permits issued by TCEQ correctly address all current applicable requirements.

B.) Public:

The effect on the public would be minimal. This rulemaking would ensure that federal operating permits correctly address all current applicable requirements.

Commissioners

Page 3

August 5, 2016

Re: Docket No. 2015-1855-RUL

C.) Agency programs:

The effect on agency programs would be negligible.

Stakeholder meetings:

No stakeholder meetings are planned; however, a public hearing will be held during the comment period on October 4, 2016.

Potential controversial concerns and legislative interest:

Staff does not expect this rulemaking to be controversial. The proposed changes will update Chapter 122 to reflect changes in federal regulations and policies. These federal programs and regulations will apply regardless of whether they are specifically cited as applicable requirements of Chapter 122.

Will this rulemaking affect any current policies or require development of new policies?

No.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If this rulemaking does not go forward, Chapter 122 will not accurately reflect current federal operating permit requirements relating to or referencing CAIR, CSAPR, or GHG permitting. This could lead to errors or oversights in permit applications, or in operating permit conditions reflecting outdated or incomplete compliance requirements.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: August 24, 2016

Anticipated *Texas Register* publication date: September 9, 2016

Anticipated public hearing date: October 4, 2016

Anticipated public comment period: September 9, 2016 - October 10, 2016

Anticipated adoption date: February 1, 2017

Agency contacts:

Michael Wilhoit, Rule Project Manager, Air Permits Division, (512) 239-1222

John Minter, Staff Attorney, (512) 239-0663

Kris Hogan, Texas Register Coordinator, (512) 239-6812

Attachments:

None.

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Erin Chancellor
Stephen Tatum
Jim Rizk
Office of General Counsel

Commissioners

Page 4

August 5, 2016

Re: Docket No. 2015-1855-RUL

Michael Wilhoit

Kris Hogan